NO. 20227

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFRED COLEMAN, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

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# APPELLANTS' CLOSING BRIEF

---

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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# APPELLANTS' CLOSING BRIEF

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## I

## INTRODUCTION

A study of the Appellee's brief herein indicates a number of fundamental weaknesses.

1. It fails to meet the points made in plaintiffs' opening brief.

For instance, the government entirely ignores the appellants' discussion in Section II, beginning on page 5 of our opening brief, in which the three charges contained in the Complaint in Contest filed by the United States are discussed. It is there shown

that none of the three charges were proved, but on the contrary each of the three charges were disproved, both by the evidence of the United States and the evidence of the Appellant Coleman.

2. While the government admits that Congress is the only authority to pass legislation concerning the disposal of the public domain, including location of mining claims (see quotation from the Standard Oil Company of California v. United States, on page 13 of appellee's brief), nevertheless the Department of the Interior and its attorneys in the brief either ignore or actually violate the laws passed by Congress involving the location and patenting of mining claims herein involved.

Both of these failures will be discussed at length later in this closing brief.

## II

## CONGRESS AND PUBLIC LAND LAWS

On page 13 of the appellee's brief there is a quotation from the case of Standard Oil Company of California v. United States, 309 U.S. 654:

"The disposal of public lands . . . is a field in which the authority of the Congress is supreme. . . . "

This, of course, cannot be questioned, because this power is given to Congress in Article IV, Section 3, Clause 2 of the Constitution of the United States.

We are delighted that the Department of the Interior and the Attorney General's office, which represents the Department,

recognize this fact, because this is what we have been contending all the way through this case, as will be seen from the various briefs filed in the District Court in opposing the Motion For Summary Judgment and its resubmission, and in our opening brief.

However, the Department of the Interior has not adhered to this constitutional provision, but on the other hand has disregarded and violated the various Acts of Congress passed for the benefit of citizens who wish to locate mining claims and secure mineral patent therefor.

1. The mining law of 1872.

(a) In our opening brief we quote from a speech made by H. R. Hochmuth, then Associate Director of the Bureau of Land Management, Department of the Interior, which he delivered on July 17, 1964, addressing the Tenth Annual Meeting of the Rocky Mountain Mineral Law Institute at Salt Lake City (see pages 29, 30 and the bottom of page 32; and again we quote from the speech on pages 43 and 44).

A complete copy of the speech is attached as "Exhibit A" to defendants' Answer in Opposition to Motion For Resubmission of Plaintiff's Motion For Summary Judgment. This exhibit is numbered pages 180 to 182 of the Clerk's Transcript herein.

(b) The appellants' mining claims were located on lands suitable for building stone under Section 161 of the Mining Law, which is both quoted and referred to in our opening brief. This section has been ignored by the Department of the Interior, and in its final decision such stone is called "common variety" under the

1955 law, although, as we shall point out, there is no limitation in Section 161 which can be construed to make a large deposit of building stone a "common variety".

2. Administrative Procedure Act.

This Act is discussed at some length under our Section VI, beginning at page 41, of our opening brief. We have pointed out how the Act has been disregarded by the Department of the Interior. In the appellee's brief it is blithely waived aside at page 24 of that brief.

## III

## SCOPE OF THE ADMINISTRATIVE PROCEDURE ACT

First of all, there appears to be a misunderstanding on the part of the appellee as to the type of procedure being pursued by the appellant under the Administrative Procedure Act. For instance, on page 22 of appellee's brief it is referred to as "a collateral attack". Perhaps this may not make much difference, but the fact is that Congress specifically authorized judicial review by the Administrative Procedure Act, which we have discussed in our argument in Section VI of our opening brief.

Our right to file a counterclaim seeking such judicial review was approved in Adams v. United States, 318 F. 2d 861 (1963), which case is cited several times in the appellee's brief.

In the Adams case, as in ours, Adams, the mining claimant, as we did, filed a counterclaim to the government's Motion For Summary Judgment. At page 867(5) the Court says in the Adams case:

"In our opinion this new case, like its predecessor, is essentially one to review the agency action. The review provisions of the Administrative Procedure Act are therefore as applicable here as they were in the early case."

Again, at page 866(4), after stating the authority of the Department of the Interior, this Court says:

". . . such determination being subject to judicial review." (Citing cases).

In connection with the scope of judicial review, the appellee quotes from two old cases: Cameron v. United States, decided in 1920, and Standard Oil Company of California v. United States, decided in 1940. From the latter, on page 13 of the brief, is this quotation:

"The disposal of public land is not a subject over which the 'judicial power' of the United States is extended. It is a field in which the authority of the Congress is supreme. . . . "

As to judicial review this, of course, is only partly true. See Boesche v. Udall, 373 U.S. 472, decided in 1963, cited by appellee. The Supreme Court said at the end of that decision:

"In so holding we do not open the door to administrative abuses . . . and final action by the Secretary, see 43 C.F.R. Par. 221.37, has always been subject to judicial review. 30 U.S.C. (Supp. IV 1963) par. 226-2, . . . " (Citing cases; emphasis added).

However, Congress in exercising its power over the public domain on June 11, 1946, passed the Administrative Procedure Act which gave the courts the power to review acts of the various administrative tribunals. We have discussed this at length in our opening brief, under Section VI.

On page 24 of its brief the appellee says, in the second paragraph, that the Administrative Procedure Act does not apply to the Department of the Interior. How dare appellee take such a position?

This, of course, is not correct. We again refer to this Court's decision in Adams v. United States, and also call the attention of the Court to a decision by Secretary of the Interior Seaton on September 28, 1956, in the case of United States v. O'Leary, 63 I.D. 341, at page 345. Secretary Seaton said:

> "Inasmuch as a mining claim is a property claim which may not be invalidated without due process of law, hearings on the validity of such claims seem clearly to be within the scope of the court decisions referred to above holding that administrative proceedings in which a hearing is necessary in order to satisfy the requirements of due process must comply with the Administrative Procedure Act, even though there is no statute requiring that the matter be determined on the record after opportunity for an agency hearing. In accordance with those decisions, the Department concludes that the hearing requirements of the Administrative Procedure Act are applicable to hearings on the validity of

mining claims."

It will be noted that for ten years, from 1946 to 1956, employees of the Department of the Interior refused to be bound by the Administrative Procedure Act passed by Congress. There is nothing in the Act which excludes the Department of the Interior.

After Secretary Seaton had issued his decision in O'Leary, 63 I. D. 341 at page 345, a press release was issued on October 12, 1956, announcing that in the future all contest hearings conducted by the Bureau of Land Management would be governed by the provisions of the Administrative Procedure Act.

Unfortunately we cannot find a copy of the press release, but we do attach as an Exhibit, in the appendix hereto, a copy of a letter from the office of the Solicitor of the Department of the Interior dated December 13, 1957, signed by Ernest F. Hom, Assistant Solicitor, Land Office, which refers to the press release and the purpose of it, which is " . . . announcing that in the future all contest hearings conducted by the Bureau of Land Management would be governed by the provisions of the Administrative Procedure Act."

Even with the above decision, the employees of the Department of the Interior did not wish to be bound by the Administrative Procedure Act, and the decision of Secretary Seaton.

In another case in which the writer of this brief was involved, an employee of the Department, in order to emasculate the decision of

the Secretary of the Interior, said:

"While the Secretary so stated, the decision should not be so broadly read."

When Congress, in order to give more protection to the public, passed Public Law 87-748 on October 5, 1962, so that the dissatisfied citizen could sue in the home district, then the Department began using summary judgment to cut off, as far as possible, the remedy of the dissatisfied citizen to have judicial review to see that his rights were protected against the arbitrary and capricious acts of the Department, and the abuse of discretion by the Department.

## IV

## COMMON VARIETIES

As pointed out in our opening brief, since the Coleman mining claims were all located years before the Surface Use Act of July 23, 1955, was passed, the use of that 1955 law was improper. See Section VII of our opening brief, beginning at page 45 thereof.

As we pointed out, an examination of the above law, known as Public Law 84-167, will show that eight times the phrase "hereafter located" is used in connection with mining claims affected by said law. Then at the bottom of page 45 we quote the final section of the law, Section 615.

From this it should be perfectly clear that any common sense reading of the law will show that it does not apply, and should not be applied, to mining claims located prior to the passage of the law, especially such as Mr. Coleman's claims, most of which were located in the years 1949 and 1951; one being located in 1950 and one in 1952.

In addition, of course Section 161 of the Mining Law is not, and cannot be, brought within the Surface Use Act of 1955, because the Congress of the United States has defined the use of the materials covered by Mr. Coleman's mining claims, to-wit: building stone.

Since the decision of the Department turns principally on the statement that the building stone located by Mr. Coleman is a common variety because it is widely dispersed, let us take a common sense look at the term "common varieties".

Following is Section 3 of Public Law 84-167:

> "A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, that nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. 'Common Varieties' as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more."

In other words, if we have a deposit of sand or gravel either 20 acres or 1000 acres, which is valuable for gold, the size of the deposit makes no difference.

Thereafter, under date of October 4, 1956, the Department of the Interior issued regulations in connection with Public Law 84-167 of 1955, entitled "Circular 1961".

In other words, the 1955 law refers to the quality of the material. There is nothing said that it shall apply to minerals which are widely dispersed.

Therefore, the decision that widely dispersed minerals are "common varieties" is contrary to law.

Since Mr. Coleman's 18 placer mining claims are all covered with building stone, Public Law 84-167, passed July 23, 1955, does not, and cannot, affect the Coleman mining claims, and the decision of the Department, which used this law illegally to arrive at the conclusion that his claims were illegal, is void and of no effect.

Furthermore, to show that the 1955 law has no bearing on the validity of Mr. Coleman's mining claims, we are attaching the following documents to this brief as exhibits in the appendix hereof:

A letter from Hon. Clair Engle, Member of Congress, to Secretary Seaton, then Secretary of the Interior. At the time the 1955 law was passed, and also on January 2, 1957, Hon. Clair Engle was Chairman of the Interior and Insular Affairs Committee of the House of Representatives. This letter, and the exhibit attached thereto, and the letter of transmittal to George W. Nilsson, are all attached as Exhibits to defendants' answer in opposition to plaintiff's motion for summary judgment. This pleading is found on page 61 of the record sent by the Clerk of the District Court, and the exhibits appear on pages 84 to 89 of the record.

In addition to the letter from Congressman Engle to the Secretary, we attach as exhibits in the appendix two letters from the office of the Bureau of Land Management:

(a) A letter dated October 11, 1957, consisting of one page, signed by Max Caplan "for the Director". This letter specifically shows that common variety of stone is such as is used for road surfacing, fill or ballast. He then goes on to say in the last paragraph:

> " . . . Stone suitable for cutting into blocks or naturally cleavable into slabs for building purposes, or stone suitable for monumental work would not be considered common varieties. "

(b) A letter dated February 29, 1959, addressed to Mr. Lionel Richman, consisting of two pages. This is signed by William Shafer "for the Director". His definition is substantially the same as that quoted above from Mr. Caplan's letter.

In the light of all of this record, by what legerdemain the Deputy Solicitor, or any other employee of the Department of the Interior, can change building stone into a "common variety" is beyond comprehension.

To sustain our position that the mineral located by Mr. Coleman as building stone is not a common variety, we call the Court's attention to a number of photographs filed as exhibits in the District Court. These are part of an affidavit made by Alfred Coleman in support of our opposition to plaintiff's motion for summary judgment. The affidavit begins on page 95 of the Clerk's record furnished by the Clerk of the District Court. The pictures appear on pages 107 to 116 of the

Clerk's record. There are color photographs on pages 111, 114, 115 and 116. These show the type of stone and a part of them show buildings which have used that stone. For instance, practically the whole building of the Bank of America located at Lake Arrowhead is built of the Coleman stone, and this is shown in a series of photographs. There is also a photograph of the face of a fireplace, and there are pictures of piles of this stone.

V

## FOSTER v. SEATON ANALYZED

The decision in Foster v. Seaton is cited a number of times in the appellee's brief and for some time has been heavily relied upon by the Department to sustain its illegal use of the 1955 Surface Use Act (P. L. 84-167). There are several reasons why this decision is not an authority in mining cases.

1. The case was decided by the Court of Appeals of the District of Columbia on October 22, 1959, 271 F. 2d, 836. It is clear that the Court in Washington was not familiar with mining matters. At that time the only place that a dissatisfied owner of mining claims could file a suit under the Administrative Procedure Act was in the United States District Court in Washington, D. C., and appeal to the Court of Appeals there.

In addition to the fact that the Washington, D. C. courts were not familiar with mining, most mining claim owners did not have the funds to go there. Therefore, Public Law 87-748, Section 1391, Title 28 U. S. Code was passed October 5, 1962, under which suit may be brought in the United States District Court in the district in

which the mining claims are located.

2. The court in the Foster v. Seaton decision divides minerals into two classes in the following language:

> "With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining. . . .". (Emphasis added.)

Of course, there is nothing in the Mining Law authorizing the Department to make such a division. The only two kinds of location in the Mining Law are Lode and Placer. Therefore, this division into two types of minerals by the Washington Court is entirely without foundation.

3. The Washington, D. C. Court of Appeals, in support of its division of minerals into two kinds, relies on two decisions by the Department of the Interior. The first one is Layman v. Ellis, 54 I. D. 294 (decided in 1933).

An examination of the Layman-Ellis decision shows that it does not involve discovery; neither does it divide minerals into two kinds.

The case is entitled and involves: ". . . taking of sand and gravel from public lands for Federal Aid Highways". The facts in the case are that the State Highway Department of New Mexico was taking gravel from Federal lands for use in building highways. There is no

question of discovery.

The second case on which that Court of Appeals relies is United States v. Estate of Victor E. Hanny, 63 I. D. 369 (decided in 1956). This case does not support the decision of the Court of Appeals in Foster v. Seaton because in the Hanny case there was no question of discovery. Discovery was admitted.

4. There is another reason why the case of Foster v. Seaton is not authority in our case. An examination of the decision will show that there is no provision in the Mining Law cited by the Court in support of its division of the minerals into two classes. Of course, none could have been cited because there is no such provision in the Mining Law, and nothing in the Mining Law can be construed to support that decision.

It will also be noticed that there are no Court decisions cited by the Court of Appeals of the District of Columbia to support its novel decision of dividing minerals into two classes.

5. There is a further reason why the decision is not applicable here.

The decision refers only to sand and gravel because the Court specifically says:

> ". . . with respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining . . ."

Even if the decision were correct as to sand and gravel, it could have no bearing here because a look at the photographs submitted in the Trial Court, attached to an affidavit by the Appellant, Alfred Coleman (see pages 107 to 116 inclusive of the Clerk's Transcript), would show it cannot apply to building stone.

In addition, there was never any question raised by the Government that Mr. Coleman was "seeking to acquire such lands for purposes other than mining". It is clear from looking at the photographs that the land is practically solid stone and could not be used for any purpose but mining of building stone.

6. As to sand and gravel, if there is gold in the sand, the decision is incorrect, because if a "wide spread" deposit of sand and gravel contains gold, or any other mineral, it is not a common variety.

## VI

## BURDEN OF PROOF

1. The question of burden of proof raised by the Appellee in its brief is really academic in our case, because all of the relevant evidence supported Mr. Coleman and the fact that the 18 placer mining claims located by him were, and are, valid. This was discussed in our Opening Brief.

The failure of the government to prove any of the charges of its complaint in contest was discussed in our Opening Brief on pages 5 to 11, inclusive. At that time we also pointed out that in the final decision by the Deputy Solicitor he ignores these three charges, and said that the only question was the lack of profit which, of course, was not alleged as one of the charges in contest.

While it is true that the Department of the Interior has taken the position for a long time that the burden of proof is on the defendant in a contest filed by the Department, such a position is contrary to basic pleading and is wrong, especially where the powerful government is the plaintiff.

It is a fundamental of American jurisprudence that a man is innocent until he is proved guilty. In other words, the prosecution has to prove the man guilty. He does not have to prove his innocence.

Certainly if that is true in criminal matters, it should be true in civil matters. Since the location of a mining claim is authorized by Congress, and since a mining claim is presumed to be valid until proved invalid, the burden of proving such invalidity is upon the Department of the Interior.

It is a fundamental rule of law that violation of the law is not presumed.

It is true that the Department has taken the opposite position, which is contrary to the general rules of mining law, such as that the mining laws must be liberally construed. This improper position as to the burden of proof taken by the Department of the Interior is one of the reasons for the passage of the Administrative Procedure Act.

Section 1006(c) of the Administrative Procedure Act provides that the burden of proof is on the proponent. The proponent here is the United States, which was the plaintiff in the Complaint in Contest. If the Administrative Procedure Act concurred with the Department of the Interior that the burden of proof was on the mining claim locator, there would have been no need for this particular provision. It would

be surplusage.

The Department of the Interior interprets this provision of Section 1006(c) of the Administrative Procedure Act by stating that when it files a contest, the mining claim owner is the proponent, although he is named in the Complaint in Contest as the contestee (defendant). By what legerdemain this can be stated we do not understand.

2. That the burden of proof should be on the government is clear, because the mining claim is presumed to be valid until it is found invalid, and because it is property in the highest sense. This is stated in a decision by the Supreme Court of the United States ex rel Wilbur v. Krushnic, 280 U.S. 304, 316, decided in 1960.

See also the quotation from Secretary Seaton in the case of U.S. v. O'Leary, above.

3. In further support of our position that the burden of proof should be on the government, we call attention to the rule that the mining laws are to be liberally construed in favor of the mining claim locator. See Lindley on Mines 3rd Ed., Vol. 2, Chapter 1; especially page 1203.

4. There is another rule which supports our position. It is that the law abhors forfeiture. Since Congress states what the citizen may do to locate a mining claim, and as so located the claim is valid until proved invalid. The action by the Department of the Interior in seeking to invalidate the claim is an attempted forfeiture. In support of this rule we cite 58 Corpus Juris Secundum, pp. 143 and 144.

The rule is also stated in MacDonald v. Midland Mining Co. (1956), 139 Cal. App. 2d, 304, at page 312 (6); 293 P. 2d, 911, where the court said:

"Every reasonable doubt will be resolved in favor of the validity of a mining claim as against the assertion of a forfeiture."

VII

SUMMARY JUDGMENT

1. Decisions Distinguished.

As our views on the impropriety of a summary judgment being used in our case is discussed in Section I of our Opening Brief at page 21, we would not discuss it again except to reply to some citations in the Appellee's Brief, particularly some decisions in other cases by this Court.

Our simple answer to these decisions is that while the summary judgment might be perfectly proper in those cases, the facts in our case are entirely different.

For one thing, in the cases involved in former decisions there was either no mineral or else the claims had not been worked for many years, the roads were washed out, or other difficulties were involved.

In the Coleman case we have practically a mountain of building stone on the 18 placer mining claims; the claims were located under a special Act of Congress authorizing such location, to-wit: Section 161 of 30 U. S. C. A. The claims are situated adjacent to a state highway and the stone has been used for building purposes.

Therefore, we had mineral on the claims; there was a sufficient amount to constitute discovery, and the amount of money spent was far in excess of the $9,000.00 necessary for patenting the 18 claims.

2. Secret Instructions.

At the first hearing of the Motion For Summary Judgment, the District Court denied it on our allegation that there were secret instructions. On resubmission, Department of the Interior regulations were attached to an affidavit by an Assistant Solicitor. The regulations, however, had to do with appeals within the Department. It had nothing to do with the instructions to a miner who wanted to locate claims. We, therefore, insist that there were secret instructions which the locator could not know about. This is supported by the speech made by Mr. Hochmuth, which is referred to in our Opening Brief in Section III, at pages 29 and 30. Mr. Hochmuth said:

> "There can be no gainsaying that the mining law of 1872 is not administered as it was originally written and intended."

He further said:

> "The result being that what we are administering today is not the mining law, but the rather substantial body of legal and quasi-legal precedents which largely are of our own making. . . . ".

Since regulations must be published in the Federal Register before they can become operative, such decisions in private cases are not notice to the mining claim locator, and are secret as far as he is concerned.

3. Illegal Requirements.

The unauthorized additions by the Department of the Interior of requirement for present profit and market in order to prove discovery were never published in the Federal Register, if the Department had been given the right to make such additions.

We say the Department was never given such authority, as the mining laws were never amended in that regard. Therefore, such additions are secret and unauthorized rules which cannot be, and should not be, binding on a mining claimant.

4. Motion Nullified.

Even though the Motion For Summary Judgment was properly considered by the District Court, the Motion should have been denied based on "Exhibit 2" attached thereto, being a memorandum from D. M. Tucker, an employee of the Forest Service, addressed to the Regional Forester. This is discussed on pages 21 and 22 of our Opening Brief, and a portion of Mr. Tucker's memorandum is quoted on page 22.

This statement concerning the land and its uses, and the fact that the land was suitable for "supplying building stone for local use", nullified the Motion For Summary Judgment; proved Mr. Coleman's counterclaim, and such Motion should have been denied.

5. Method of Review Provided by Congress.

To us it seems so clear that since Congress, in the Administrative Procedure Act, provided the method for judicial review and set out in Section 1009(e) a number of items to be considered, this is the method to be pursued in the United States District Court.

While it is true that the scope of review provided in the Administrative Procedure Act is largely limited to legal questions and, therefore, may be analogous to summary judgment, we cannot help but feel that the process is somewhat broader under the Administrative Procedure Act Judicial Review.

Undoubtedly the term "summary judgment" carries the implication to the trial court that it should take summary action, whereas if the motion were called "Motion For Review Under The Administrative Procedure Act" this would have an entirely different implication. Certainly if that had been the motion in our case I doubt if the judge presiding in our case would have said that our case was not one for judicial review under the Administrative Procedure Act.

Again we refer to the fact stated both in the Appellee's Brief and discussed by us, that Congress is the only body authorized to legislate. When there is legislation it is the duty of the administrative tribunals and the courts to carry out such legislation.

In this connection, as it affects the Administrative Procedure Act, we refer the Court to our quotation from Wong Yang Sun v. McGrath (1950), 339 U.S. 33, on page 26 of our Opening Brief.

## CONCLUSION

The Department of the Interior made much of the fact that Mr. Coleman had not made a profit. Would any new enterprise ever grow if a profit was expected immediately? Of course, this Court in U.S. v. Adams, denies that present profit must be proved.

The testimony of Mr. Coleman was that he was getting the

land in shape and filing an application for patent so that he would be in a position to secure financial assistance to make this into a large operation. This, of course, is "good common sense", and is the method pursued by innumerable individuals and organizations in starting a small project and growing into a larger one.

This is the American system of individual initiative and free enterprise, and should not be stifled by illegal requirements as to proof of discovery and illiberal construction of the facts and the law.

Again we call attention to the rule that the law as it affects mining claims should be liberally construed.

We, therefore, renew our prayer as stated in our Opening Brief.

1. That the judgment of the District Court be reversed.

2. That the District Court be directed to find that the decision of the Department of the Interior is void, and ordering said Department to issue a mineral patent to Alfred Coleman covering the 18 Baldwin Lake Quarry Placer Mining Claims involved herein.

Respectfully submitted,

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Of Counsel

## CERTIFICATE

I certify in connection with the preparation of this brief that I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

/s/ George W. Nilsson

GEORGE W. NILSSON

House of Representatives, U. S.
OFFICE OF THE CHAIRMAN
WASHINGTON, D. C.

January 2, 1957

Honorable Fred A. Seaton
Secretary of the Interior
Washington 25, D. C.

My dear Mr. Secretary:

Reference is made to Section 5 of the new Multiple-Use Mining Law (Public Law 167, 84th Congress, 1st Sess.), which provides a procedure for determining expeditiously title uncertainties resulting from the existence of abandoned, invalid, dormant, or unidentifiable mining claims located prior to the passage (July 23, 1955) of Public Law 167.

When the House Committee on Interior and Insular Affairs considered and recommended the passage of the legislation which became Public Law 167, it was the understanding of this committee that section 5 was intended to be used only as a means whereby fraudulently-located, abandoned, or invalid mining claims located prior to the passage of the law would be placed in the same status, with respect to surface rights, as claims located after July 23, 1955. It was never intended that the procedures set forth in section 5 would be used to bring the average mining claimant to task and to serve as a dragnet to recapture for the Federal Government certain surface rights to bona fide mining claims located prior to July 23, 1955.

I am disturbed by reports reaching me which indicate that section 5 of Public Law 167 is being administered in a manner contrary to that contemplated and intended by this committee. I hope these reports will prove to be unfounded.

In view of the concern and responsibilities of this committee, I would appreciate being informed of the following at the earliest possible date:

A. With respect to each request for publication of notice to mining claimants for determination of surface rights, received by the Department of the Interior as of January 1, 1957, please furnish in table form and with appropriate column totals -

1. The name of the requesting department or agency;
2. Date each request was filed or received;
3. Office where filed;
4. Name of county, state, National forest or other named area in which lands are situated;
5. Approximate acres of lands covered;
6. Approximate number of (a) mining claims and (b) mining claimants affected;
7. Date of first publication of notice to mining claimants - actual or anticipated (indicate which)
8. Number of claimants to whom notices (a) have been or (b) will be mailed; and
9. Final date for filing verified statements - actual or anticipated dates (indicate which).

B. In regard to the total number of published notices, where the time for filing verified statements expired on or before January 1, 1957, please indicate -

1. The number of verified statements received in response thereto;
2. Number of claimants who filed verified statements;
3. Approximate number of (a) claimants who failed to file verified statements, other than those who signed waivers pursuant to section 6 of P.L. 167, and (b) mining claims affected thereby;

4. Number of (a) claimants who waived and relinquished certain surface rights to their mining claims pursuant to section 6 of Public Law 167, and (b) mining claims affected thereby;
5. The fixed or anticipated (indicate which) time and place for each hearing to be held as a result of the filing of the verified statements;
6. Number of (a) mining claims and (b) claimants thereto exempted from the hearings as a result of stipulations granted by the agency requesting publication of notice, wherein said agency acknowledges the validity and effectiveness of asserted surface rights to the claims; and
7. Number of (a) mining claims and (b) claimants thereto that will be affected by the hearings.

I would like to be supplied with (1) an outline of the proceedings of a typical hearing and (2) a copy of the established general procedures and rules of practice of the Department of the Interior with respect to contests or protests affecting public lands of the United States, which will govern the procedures with respect to notice of hearings and the conduct thereof, and with respect to appeals.

C. Will the burden of proof be on the mining claimants who appear at hearings held to determine the validity and effectiveness of any right or title to, or interest in or under their mining claims? If so, what would a mining claimant be expected to present in evidence to refute successfully the adverse contentions, where based upon a mineral examination of a claim, of the department or agency appearing against the claimant?

D. Does the Bureau of Land Management make mineral examinations of mining claims to determine their validity (1) before requesting a publication of notice to mining claimants, (2) after requesting publication of notice and before the filing of verified statements, (3) after the filing of verified statements, or (4) during all three periods? In those instances where mining or mineral experts of the Bureau of Land Management have looked over mining claims prior to the filing of requests for a publication of notice and the claimants thereto subsequently file verified statements, do mining or mineral experts of the Bureau always return to such claims and make a thorough mineral examination of each one to determine the validity and effectiveness of asserted surface rights?

E. When the Bureau of Land Management finds that valuable minerals do occur in a mining claim, does it ever look for or use other technicalities or defects to question or challenge the validity and effectiveness of asserted surface rights? If so, please explain and itemize each technicality or defect it may seek or use for the purpose.

F. Morrison's "Mining Rights", a publication which has served as a guide to prospectors, mining claimants, and attorneys for many decades, contains brief summaries of hundreds of court decisions defining the rights of mining claimants. Several summaries of court decisions which relate to that which constitutes a "discovery" and entitles a miner to make a valid location, taken from said publication, are presented in an attachment to this letter. Please inform me whether or not the Bureau of Land Management and the Department of the Interior recognize the rights set forth in the summaries attached hereto as being in full force and effect at this time. If not, please explain in full, cite court decisions, and present in full the criteria being used in the field and which will be used in hearings to determine the validity and effectiveness of asserted surface rights in mining claims.

G. If the value of the minerals found in the discovery shaft or other workings of an unpatented mining claim is used by the mineral experts of the Government to measure and determine the validity of a mining claim, and I am informed that such is the case, what is the cut-off point, in dollars or cents and in mineral content, below which lode

mining claims are considered to be invalid where the mineralization found contains: 1. Gold, 2. Silver, 3. Lead, 4. Zinc, 5. Copper, 6. Manganese, 7. Tungsten, 8. Chromite, 9. Iron, 10. Mica, 11. Fluorspar, 12. Uranium? If the size of a vein, lode, or deposit has any bearing on the determination of the validity of a mining claim, please explain and give controlling measurements.

H. Regarding mining claims which were located in accordance with the Mining Laws of the United States prior to July 23, 1955, and on which the annual assessment work has been performed each year, does the Bureau of Land Management assert that such claims are subject to invalidation procedures under the provisions of Public Law 167 and, if so, on what basis?

I would also appreciate receiving copies of all outstanding instructions, orders, or rules issued by the Bureau of Land Management or the Department of the Interior which serve as a guide in conducting mineral examinations and in making determinations as to the validity of mining claims.

I anticipate that this committee will commence a series of hearings on the operation of Public Law 167 later this month. Therefore, I would appreciate being notified as to when the information requested herein may be received by the committee. Please forward such information as will be prepared locally as soon as it is ready, without waiting for the data that may be compiled in the field.

Sincerely yours,

/sgd/ Clair Engle

CLAIR ENGLE
Chairman

Attachment

Hearings held January 31 and February 1, 1957
Report of hearing printed. It contains above letter as well as testimony.

(Emphasis added)

CERTAIN SUMMARIES OF COURT DECISIONS
TAKEN FROM
MORRISON'S "MINING RIGHTS"

Discovery the Inception of Title. (Page 29)

The discovery of a lode of itself gives title to the vein for such length of time as is allowed by law for the completion of the location and record (Murley v. Ennis, 12 M.R. 360; Erhardt v. Boaro, 4 M.R. 432; 113 U.S. 527); and when the location and record are made, if made in due time, the inception of title relates back to the date of discovery. (Burke v. McDonald, 29 Pac. 98.)

The Discovery Need Not Show Pay Ore. (Page 33)

It is sufficient that it disclose such a crevice as a miner would be willing to further open and follow.--McShane v. Kenkle, 44 Pac. 979; Shreve v. Copper Bell Co. 28 Pac. 315; Muldrick v. Brown, 61 Pac. 428.

Proof of Mineral Contents. (Page 33)

The discovery must be of a mineral bearing vein or deposit. The proof of mineral value does not require an assay, although an assay if taken is of material value as evidence.--Healey v. Rupp, 63 Pac. 319.

What is quartz or mineral bearing rock is determinable by the eye in most cases and such ores as galena, zink-blende, copper pyrites and many others necessarily indicate mineral contents. There are, however, varieties of ochre and other discolored earth and rock which may or may not carry any kind of valuable mineral, in which instances an assay or other test in common reason should be required.

Discovery Must Show Well Defined Crevice. (Page 42)

Besides reaching a certain depth, a well defined crevice must be found in the shaft.--Cheesman v. Shreeve, 40 Fed. 787; 17 M.R.__. "Crevice" means a "mineral bearing vein."--Beals v. Cone, 62 Pac. 958.

If a crevice does not show in ten feet, the shaft must go deeper; if it appears sooner, the ten feet must still be completed. The crevice shows the lode discovered, the depth shows the lode appropriated; even before the passage of any ten-foot shaft law, such a crevice was required to be shown; as decided by Hon. Judge Belford upon the location of the Bowman lode; but in the Eagle-Badger injunction case, decided at Denver, Hon. Judge Wells, while holding the necessity of a discovery shaft of the depth fixed by statute, also ruled that the term "crevice" must be taken in connection with the nature of the deposit, and that if, as was suggested, the Mt. Lincoln discoveries were not true veins or fissures, the shaft might pass entirely through the deposit and still remain a valid monument of occupation.

(Pages 42 and 43)

It Need Not Contain Ore or Mineral, but it must show mineral bearing rock--that is the gangue or crevice material of the vein--Copper Globe Co. v. Allman, 64 Pac. 1020--and it is error to omit this, as one of the essential elements of a discovery shaft in an instruction purporting to define such elements.--Bryan v. McCaig, 10 Colo. 309. It need not show pay ore.--Muldrick v. Brown, 61 Pac. 428.

Size and Richness of Deposit Not Material. (Page 152)

In North Noonday Co. v. Orient Co. 9 M.R. 537, Sawyer, J., says: "A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock in place, carrying gold, silver or other valuable mineral deposits named in the statute. It may be very thin and it may be many feet thick, or thin in places--almost, or quite pinched out, in miners' phrase--and in other places widening out into extensive bodies of ore. So, also, in places, it may be quite, or nearly, barren, and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location including the vein or lode." Its validity as a thing that may be located does not depend on what it runs.--Shreve v. Copper Bell Co. 28 Pac. 315; Stinchfield v. Gillis, 30 Pac. 839. Neither walls nor pay ore is essential, but it must show rock distinguishable from the country.--Burke v. McDonald, 33 Pac. 49. The fissure must be defined.--Cons. Wyoming Co. v. Champion Co. 63 Fed. 540.

On the facts in this case it is too late to call one vein a spur and the other a main vein.--Carson City Co. v. North Star Co. 73 Fed. 601.

(Page 153)

Whatever a Miner Would Follow with the expectation of finding ore, or similar phrases, have been adopted as a practical test of what is to be considered a lode under the Act of Congress.--Eureka Co. v. Richmond Co. 9 M.R. 578; Harrington v. Chambers, 1 Pac. 362. Any body or belt of mineralized rock is a lode.--Book v. Justice Co. 58 Fed. 106; Shoshone Co. v. Rutter, 87 Fed. 801.

All Deposits "in Place" are Lodes. (Page 155)

The uniform ruling has been that all forms of mineral or mineral gangue in place, whether fissure or contact veins, or impregnations, or other irregular deposits, should be construed to come within the expression "veins or lodes" used in the Act of Congress, and as such to be subject to location and patent under the Act.--Hayes v. Lavagnino, 53 Pac. 1029.

(Emphasis added)

Clair Engle
2d District, California

Home Address:
Red Bluff, California

Office Address:
323 House Office Building

# Congress of the United States
## House of Representatives
### Washington, D. C.

Chairman
Committee:
Interior and Insular Affairs

January 8, 1957

Mr. George W. Nilsson, Secretary
Mining Association of Southern California
510 West Sixth Street
Los Angeles, California

Dear Mr. Nilsson:

Attached please find a copy of a letter sent to Secretary Seaton on January 2, 1957, with regard to the procedures set up under Public Law 167, 84th Congress.

This is the law enacted under what was commonly known as the Multiple Use Bill. It set up certain procedures for getting rid of fraudulently located and abandoned mining claims; however, our information is that the Bureau of Land Management and the Forest Service are using this measure as a dragnet to challenge all mining claims of every kind and character.

The purpose of this letter is to find out exactly what is being done preliminary to hearings which will be held on the subject before our committee. A similar letter has gone to Secretary Benson of the Department of Agriculture.

Any information you can give the Committee on this subject will be very much appreciated.

Yours sincerely,

Clair Engle
Chairman
Committee on Interior and Insular Affairs

CE:lwl

Enclosure

Emphasis Added.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

5.04a

OCT 1 1957

Mr. George W. Nilsson
510 West Sixth Street
Los Angeles 14, California

Dear Mr. Nilsson:

We are enclosing two copies each of Circulars 1921 and 1961 containing regulations issued under the Multiple Use Act of July 23, 1955 (69 Stat. 367), and the Disposal of Materials Act of July 31, 1947 (61 Stat. 681).

Section 185.121 of Circular 1961 defines common varieties of minerals. As you know, it would be difficult to define a common variety of any material in such a way that it would not be subject to some misunderstanding. However, if the deposit of stone you are interested in developing has no special physical or chemical properties which differentiate it from other deposits of such material so as to give it a special and distinct value, it would be a common variety. For example, stone used for road surfacing, fill or ballast would be considered a common variety.

Stone, commercially valuable because of distinct and special properties, such as limestone suitable for cement making or of metallurgical or chemical grade, or stone suitable for cutting into blocks or naturally cleavable into slabs for building purposes, or stone suitable for monumental work would not be considered common varieties.

Sincerely yours,

For the Director

Enclosures

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

DEC 13 1957

Mr. George W. Nilsson
Attorney at Law
510 West Sixth Street
Los Angeles 14, California

Dear Mr. Nilsson:

In accordance with the request contained in your letter of December 10, 1957, to Solicitor Bennett, there are enclosed two copies of a press release issued on October 12, 1956, announcing that in the future all contest hearings conducted by the Bureau of Land Management would be governed by the provisions of the Administrative Procedure Act.

Sincerely yours,

Ernest F. Hom

Ernest F. Hom
Assistant Solicitor
Land Appeals

Enclosures

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

5.04a

2389 - 1959

Mr. Lionel Richman
Garrett, Richman & Nicoson
1250 Wilshire Blvd., Suite 206
Los Angeles 17, California

FEB 13 1959

Dear Mr. Richman:

Your letter of January 28 concerns the location of mining claims for dolomite and/or limestone. There are enclosed three papers which in part pertain to this subject:

Lode and Placer Mining Regulations - November 1, 1955; Circular 1941

Public Law 167 - 84th Congress - Act of July 23, 1955

43 CFR Part 185 - General Mining Regulations
Sec. 185.120 through 185.137

The first pamphlet relates to the location of mining claims in general. The second paper is a copy of the Act of July 23, 1955. The third paper is a copy of the mining regulations concerned with the Act.

Under section 3 of this Act it states: "A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more."

In Part 185.121 (b) and in footnote 2 of the regulations the term "common varieties" is defined. In the interpretation of this definition, it is not our intention to imply that limestone, gypsum or other like material possessing "distinct and special" properties would be excluded from the operation of the mining laws and placed under the Materials Act of 1947 (61 Stat. 681). We feel that these materials when they possess special properties that make them useful in the production of cement, metallurgical or chemical grade limestone, etc., should remain under the Mining Laws of 1872.

To further amplify on the stated definition in the regulations, a "common variety" of material is one that has no special physical or chemical properties which differentiate it from other deposits of such material so as to give it a special and distinct value. Certainly, under our definition of the term, limestone, quartzite or other material valuable for metallurgy, limestone suitable for cement making, stone suitable for cutting into blocks or naturally cleavable into slab suitable for building, or silica sand suitable for glass manufacture, foundry use, for example, would not be a "common variety". Such materials would remain subject to location under the mining laws upon a valid discovery and would, as in the past, be subject to patent upon proper application.

Therefore if the material is not a "common variety" of limestone it is locatable under the mining laws. If it is a "common variety" it must be purchased under the Materials Act of 1947 (61 Stat. 681), (see 43 CFR Part 259). Dolomite and or/limestone are not covered by the mineral leasing laws except in certain special areas.

Sincerely yours,

For the Director

W. L. Chafin

Enclosures

(Emphasis added)

No. 20225.

UNITED STATES COURT OF APPEALS

For the Ninth Circuit.

THE MUTUAL LIFE INSURANCE COMPANY,
OF NEW YORK, a corporation,

Defendant-Appellant,

vs.

ROBERT G. MOOREMAN, Trustee of the Estate of
LAING-GARRETT CONSTRUCTION
SPECIALTIES, INC.,

Plaintiff-Appellee.

On Appeal From The Judgment Of The United States
District Court For The District Of Arizona.

# BRIEF FOR APPELLEE, ROBERT G. MOOREMAN, Trustee of the Estate of LAING-GARRETT CONSTRUCTION SPECIALTIES, INC.



WILSON & McCONNELL

707 Security Building
Phoenix, Arizona 85004

Attorneys for Plaintiff-Appellee.

# I N D E X.

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No. 20220.

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Defendant-Appellant,

vs.

ROBERT G. MOOREMAN, Trustee of the Estate of LAING-GARRETT CONSTRUCTION SPECIALTIES, INC.,

Plaintiff-Appellee.

---

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

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# BRIEF OF APPELLEE-CROSS APPELLANT, ROBERT G. MOOREMAN, Trustee of the ESTATE OF LAING-GARRETT CONSTRUCTION SPECIALTIES, INC.

## JURISDICTIONAL STATEMENT.

Plaintiff as Trustee in Bankruptcy of the Estate of Laing-Garrett Construction Specialties, Inc., an Arizona Corporation, brought action in the District Court of the District of Arizona, seeking judgment against Mutual Life Insurance Company of New York in the sum of $80,000.00. Defendant was not an Arizona corporation, although licensed and qualified to do business in that State. Jurisdiction of the District Court is founded upon Sections 1332 and 1391, Judicial Code, Title 28, U.S.C. and by virtue of Section 46 of the Bankruptcy Act, Title 11, U.S.C. Jurisdiction of the United States Court of Appeals for the

Ninth Circuit is founded upon Sections 1291 and 2107, Judicial Code, Title 28, U.S.C., Notice of Appeal from judgment entered April 29, 1965, having been filed and docketed within the time prescribed by law.

## STATEMENT OF CASE.

Plaintiff as successor in interest to LAING-GARRETT CONSTRUCTION SPECIALTIES, INC., (hereinafter called "corporation"), by his complaint sought judgment against MUTUAL LIFE INSURANCE COMPANY OF NEW YORK to recover death benefits payable pursuant to a policy issued by defendant upon the life of C. W. Laing, and on which policy LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. was named beneficiary. The defense alleged was that the policy had lapsed on January 27, 1961, for non-payment of a premium due that date. It is plaintiff's position that defendant was indebted to the policy owner on January 27, 1961, in a sum more than sufficient to pay the premium then due, and is conclusively presumed to have applied such sum to the payment of the premium to prevent lapse.

## FACTS.*

In August of 1957 defendant MUTUAL LIFE INSURANCE COMPANY OF NEW YORK issued its policy No. 823-53-41S insuring

*All references in parenthesis refer to stenographic trial transcript or an exhibit unless otherwise noted.

the life of Charles W. Laing. The policy was in the face amount of $40,000., but provided that should the insured die as a result of riding as a passenger in an aircraft that the sum of $80,000. would be payable. It also named LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. as the beneficiary, and also expressly provided "during the insured's lifetime all rights belong exclusively to LAING-GARRETT CONSTRUCTION SPECIALTIES, INC., or its successors", and "during the insured's lifetime the rights under this policy include the rights to change the beneficiary, to assign and all other rights, benefits, options, and privileges conferred by this policy or allowed by the company." (Exhibit A; Page 43).

The insured died on April 22, 1961, as the result of riding as a passenger in an aircraft (Trial Court's Findings of Fact No. 5, Exhibit 7), and plaintiff, as Trustee of the then bankrupt estate of the corporation, presented a claim to defendant for payment of the death benefits, which claim was rejected for the stated reason that the policy had lapsed for non-payment of the premium due January 27, 1961. (Exhibit 6; Trial Court's Finding of Fact No. 7). It is not disputed that all premiums on the policy had been paid up until that time (Exhibit 10) and that if the premium due January 27, 1961, was paid, the policy was in full force and effect at the date of the insured's death, and that death benefits were due to the beneficiary.

Plaintiff's claim that the defendant was indebted to the policy owner on January 27, 1961, in a sum sufficient to

pay the premium arises out of a loan transaction in August of 1960. At that time the corporation requested a loan against the policy. Pursuant to defendant's normal procedure and requirements, defendant's agent, Mr. Lillico, took the loan application to Mr. E. J. Hilkert, secretary of the corporation, and obtained his signature thereon (Exhibit H; Page 166 and 199). The application was sent to the defendant who approved the loan "subject to Resol. of the B. of D. authorizing the secretary to request loan" (Page 168, and Page 5 of Court's Findings of Fact). Mr. Laing, the other officer of the corporation did then send to the defendant, on a corporate letterhead, a copy of the resolution confirming Mr. Hilkert's authority to request the loan. (Exhibit I; Page 145-146, Page of Court's Findings of Fact). Ultimately the loan for $2,491.46 was approved. Two days later, when it came time to disburse the proceeds of the loan, $364.80 thereof was used to pay the current premium on the policy, and defendant delivered to Mr. Laing a check payable to LAING-GARRETT CONSTRUCTION SPECIALTIES, INC., in the sum of $1,668.11 (page 90, and Page 5 of the Court's Findings of Fact). The remaining $458.55 of the loan was not paid to the corporation, although defendant has continually claimed that the total loan was $2,491.46, and has charged the corporate owner of the policy interest on that sum and extracted payment of that amount. Further, the balance of these loan proceeds has <u>never</u> been paid to the corporation, or plaintiff as its successor. Such sum, of course, was more than sufficient to

pay the quarterly premium of $364.80 due on January 27, 1961, the alleged date of lapse.

Defendant states that the $458.55 was not paid to the corporation because Mr. Laing orally instructed them to use this sum to pay a premium then due on another policy issued by the defendant and owned by Mr. Laing personally (P. 131). They acknowledge, however, that the corporation played no part in this request, that they relied solely upon Mr. Laing and made no effort to confirm his authority with anyone else in the corporation.

Books and records of the corporation did not reflect the loan from the defendant to the corporation, or what disbursement was made of the loan proceeds. (Page 324).

Appellee cannot acquiesce in the statement of facts submitted by appellant herein and submits that same is incomplete, substantially incorrect, and certainly misleading. Particularly, we call the Court's attention to the following:

a. There is no evidence before the Court to show that LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. was anything other than a legitimate corporation, and the fact that they had only two stockholders, directors and officers does not alter the situation. The company was engaged in the construction specialties business, primarily in the field of acoustical ceiling and flooring. Mr. Laing was the person experienced in the industry, and Mr. Hilkert, with his accounting and legal background, served as financial backer and in an advisory capacity when special problems arose.

(Page 236-237); 261; 269-270). Whether or not Mr. Laing may have breached a fiduciary duty to the corporation does not in any way effect legitimacy of the corporation itself, nor make it his alter ego.

b. The issuance by defendant of two additional policies to Mr. Laing personally, is immaterial to the controversy before this Court. LAING-GARRETT CONSTRUCTION SPECIALTIES, INC., the corporation, and plaintiff as its successor, have never, and do not now, claim any interest in Mr. Laing's personal policy. The record is devoid of any showing that they at any time participated therein, or in any agreements affecting same.

c. Automatic premium loan provisions of the corporate policy are not material to any controversy herein, for the reason that plaintiff has never contended, and does not contend, that the defendant should have granted another automatic premium loan to pay the premium due January of 1961, nor has plaintiff at any time contended that defendant should invade the "loan value" of the policy to pay the crucial premium.

d. Mr. Laing did not pay $469.00 of his own money (loan proceeds from his personal policy) to the corporation. It is true that defendant approved loans on two additional policies owned by Mr. Laing personally, and that the proceeds of one of these loans, to-wit, $469.00 was deposited in the corporate bank account. This deposit, however, is reflected in the books and records of the company as a credit against

Mr. Laing's personal account. There is absolutely no entry in the account showing Mr. Laing's use of the corporation's $458.55 loan proceeds used to pay his personal premium (Page 322). Peculiarly, the check in the sum of $1,668.11 which was made payable to LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. and which represented corporate loan proceeds, (Exhibit E) is also credited to Mr. Laing's account with the corporation (Page 325).

e. While there is no doubt that Mr. Laing was indebted to the corporation, it is impossible to determine from the record before the Court and the books of the corporation, the extent of any such debt. Contrary to appellant's statement of facts, Exhibit Z, the ledger sheet entitled "Due Officers-C.W. Laing," does not reflect Mr. Laing's indebtedness, as it must be read together with Exhibit 11 entitled "Loans Payable-C.W. Laing" (Page 320). Further, these two exhibits together reflect merely debits and credits to Mr. Laing's account and the significance of the various entries cannot be pinpointed nor interpreted for the reason that the corporation did not follow normal accounting procedures, and Mr. Laing had used a personal bank account as a clearing house for corporate funds, all of which would be reflected by adjusting entries in his personal account (Page 316, Page 254).

f. Books and records of the corporation did not reflect whether or not Mr. Laing had paid previous premiums with corporate funds (Page 323-324), and if any funds of

the corporation were ever used to pay such premiums, the corporation did not have any notice thereof (Trial Court's Finding of Fact No. 12).

g. The record before the Court does not support a conclusion that the corporation at any time had authorized the use of its bank account for payment of premiums on Mr. Laing' personal policy. Defendant tried to establish such point, however, by offering Exhibits O and N which were two money-matic requests, by which they state Mr. Laing allowed them to draw checks on the corporate bank account to pay his personal premiums (Exhibits O and N). Objection was made by plaintiff to the admission of these documents, and ruling by the Trial Court was reserved pending argument in the briefs. No express finding has been made by the Trial Court as to whether or not the Exhibits were admitted, but pursuant to judgment in favor of plaintiff, we assume that they were not Further, Exhibit O does not even purport to be signed by Mr. Laing as an officer of the corporation, but bears his personal signature without designation of the capacity in which he signed it. More important, the corporation did not even kno that Mr. Laing had at any time used corporate funds to pay personal premiums (Trial Court's Finding of Fact No. 12, Page 323-324).

h. Defendant is not an innocent bystander to this transaction, but, in fact, not only allowed the diversion to occur, but compounded the confusion caused thereby by quoting erroneous lapse dates, not forwarding lapse notice

within the normal time, quoting excessive figures necessary to reinstate the policy, and erroneous premium dates (Pages 186-187; Page 213). In addition, the letter of April 11th directed to Mr. Hilkert by which they allege he was put on notice as to the transaction, and which letter, by the way, was received only nine days prior to the insured's death, and hardly in time to allow any action to be taken, and was wholly erroneous and misleading (Pages 132-133; 216).

## QUESTIONS PRESENTED.

Whether or not death benefits were payable to LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. and plaintiff as its successor on policy No. 823-53-41S is dependent upon a finding of whether or not the defendant had on hand, or was indebted to the policy owner on January 27, 1961, in a sum in excess of $364.80, the amount necessary to pay the premium which then fell due. More specifically then we are concerned with determining whether or not the record before this Court supports a finding that plaintiff is not bound by defendant's attempted use of $458.55 of company loan proceeds to pay a premium on a policy owned by anyone other than LAING-GARRETT CONSTRUCTION SPECIALTIES, INC.

In addition, and pursuant to cross-appeal filed by plaintiff, was plaintiff entitled to interest on the amount of his claim from the date of proof of the insured's death?

Contrary to the implications made by defendant on Page 9 of its brief, there has never been an issue in this lawsuit

as to whether or not Mr. Laing was the alter ego of LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. In fact, any such contention now is wholly inconsistent with the position taken by defendant at trial. (See defendant's opening statement Page 33-34 of the Transcript). Of course, this issue cannot properly be raised for the first time on appeal.

## SPECIFICATION OF ERROR.

In support of cross-appeal herein, appellee-cross-appellant, Robert G. Mooreman as Trustee of the Estate of LAING-GARRETT CONSTRUCTION SPECIALTIES, INC., submits that the lower Court erred in finding and ruling that plaintiff was not entitled to interest on the amount of the judgment herein from and after the date of proof of the insured's death, plaintiff's complaint, trial memorandums, and proposed findings of fact and conclusions of law, having at all times requested same.

## ARGUMENT.

While in adversary proceedings of this kind, one would expect variance in the interpretation that each party may place upon the evidence presented, the conclusions which defendant attempts to make herein go far beyond the scope of reasonableness. Appellant's argument in its brief is replete with gross exaggeration, and even factual misstatement. We request the Court exercise caution in accepting any of the factual statements unless there is also a record reference

to verify them.

In sum and substance, the decision of the Trial Court reflects that the defendant has not sustained its burden of proving that the policy (Exhibit A) was not in full force and effect on the date of Mr. Laing's death. Presumptively, it was in full force and effect, and it was the defendant's burden to establish to the contrary.

> "An insurer admitting the issuance of a policy sued upon has the burden of showing its invalidity. The contract is presumed valid and subsisting and it is for the insurer to show facts as to its invalidity; it has, therefore, the burden of proving a forfeiture, particularly when the beneficiary has established a prima facie case."
> (Volume 21, Appleman on Insurance, Page 18, No. 12095)

The Supreme Court of the State of Arizona has also approved this principle. In Sovereign Camp W.O.W. v. Madrigal, 12, P. 2d. 615, 40 Ariz. 396, (1932) our Supreme Court said:

> "It is a general rule of law that, when an insurer pleads and relies upon the non-payment of a premium or assessment as grounds for forfeiting the policy, after it has once been placed in force, the burden of proving such non-payment is upon it."

The above principle is only a reiteration of the general attitude of the law, which abhors forfeitures. Liberal rules of construction to avoid forfeitures are approved, and it is well established that Courts will always deal generously with the rights of an insured. (16 Appleman on Insurance, Page 599, No. 9082; Watson v. Ocean Accident and Guarantee Corp., 238 P. 338, 28 Ariz. 573 (1925); No. British and Mercantile

Ins. Co. v. San Francisco Securities Corp., 249, P. 761, 30 Ariz. 599).

Obviously the Trial Court was not satisfied, and did not believe that the premium of January 27, 1961, was not paid. In fact, it has expressly found to the contrary:

> "That the premium which became due January 27, 1961, on said corporate policy was paid within the time required by said policy, and that therefore, the said policy was on and before January 27, 1961, and after the death of the said Charles W. Laing in full force and effect." (Finding of Fact No. 14)

The Trial Court's Finding of Fact "shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses" (Fed. Rules of Procedure Rule No. 52, 28 U.S.C.A.). The Court of Appeals does not retry the issues and substitute its judgment for that of the trial court (Weiby v. Farmers Mutual Auto Insurance Company, 273, F. 2d 327, C.C.A. Min. (1960). A trial court's finding will not be disturbed unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law (C.S. Foreman Co. v. Great Lakes Pipe Line Co., 274 F. 2d 61, C.C.A. Mo. (1960). The findings made by the trial Judge here are sustained by the evidence, and are not induced by any erroneous view of the law.

PLAINTIFF IS NOT BOUND BY DEFENDANT'S ATTEMPTED USE OF $458.55 OF COMPANY LOAN PROCEEDS TO PAY A PREMIUM ON A POLICY OWNED BY ANYONE OTHER THAN LAING-GARRETT CONSTRUCTION SPECIALTIES, INC.

Upon approval of the loan application, defendant held $2,491.46 for its policy owner. Of this they used $364.80 to pay a premium then due on the policy, and they executed and delivered to president Laing a check payable to the corporation for $1,668.11. The remaining $458.55 has never been paid to LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. or its assigns or to its benefit. The only reasonable conclusion, therefore, is that defendant continued to hold this sum for its policy owner and therefore, had it on hand on January 27, 1961. If they did not have said sum on hand, then they have wrongfully and fraudulently misappropriated it to its own use or to some other use, and are liable to plaintiff therefor. They claim they used this sum to pay a premium of Mr. Laing's personal policy and that this was done at his request. (Page 131). Any such request made by Mr. Laing was on its face ultra vires the powers of the corporation, a breach of his fiduciary relationship, and in fraud of his principal's interest. Further, and more important, this was obvious to the defendant, or certainly should have been obvious to them.

If it is defendant's position that Mr. Laing was authorized to make this diversion and to bind the corporation

thereby, it was their burden to establish this. The burden of establishing authority of an agent rests upon the one who alleges he was authorized. (Bank of America National Trust and Savings Association v. Barnett, et al, 87 Ariz. 96, 348 P. 2d. 396, (1960). The Supreme Court of Arizona in the last cited case states:

> "The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal, and like a railroad crossing suggests the ability to 'stop, look and listen,' and if he would bind the principal is bound to ascertain not only the fact of agency, but the nature and extent of authority, and in case either is controverted the burden of proof is upon him to establish it."

The Trial Court has found:

> "That Laing did not at any time have apparent nor implied authority to use corporate funds to pay any premium on policy No. 83-96-309 owned by Charles W. Laing personally, and that said Laing had no authority to use said sum of $458.55 to pay a premium on his said policy, and had no authority to instruct the insurance company to apply said sum of $458.55 in payment upon his personal policy." (Finding of Fact No. 10)

and

> "That defendant insurance company had no right nor authority to use said indebtedness of $458.55 of corporate loan proceed to pay a premium on policy No. 83-96-309 owned by Charles W. Laing personally or upon a payment of any other policy other than the 'corporate policy'." (Finding of Fact No. 11)

A. Mr. Laing did not have actual authority to request the diversion.

Powers of a corporation are, of course, derived from its Articles of Incorporation (Exhibit I) which here do not authorize use of company assets for payment of personal insurance premiums, or in fact for any personal purposes of the officers. (Page 262). A corporation cannot empower an officer to do any act which may not lawfully be done under its charter (13 Am. Jur. 869, Corporations 889). Hence, LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. was without the capacity to authorize Mr. Laing to use their company money for his personal premiums. The corporation, in fact, through its Board of Directors and other officer, Mr. Hilkert, did not ever grant actual authority to Mr. Laing to do so (Page 264, and Page 267), except for minor accommodation purposes. And even with the most severe cross-examination, defendant was unable to extract any evidence to the contrary. Any attempt by Mr. Laing to use company money for his personal premium was absolutely beyond the scope of his actual authority, and the record is devoid of any evidence to the contrary.

Defendant would have us believe that because Mr. Laing had used corporate credit for "accommodation purchases" that this is evidence that he had authority to use corporate funds for personal reasons other than accommodation purchases. (Page 242-243). The corporation did qualify for discounts in their industry, and when any officer of the corporation, or employee, wanted to make a purchase on which the company would be entitled to a discount, they were granted the privilege of making the purchase in the corporation name and

having the billing go to the corporation. This was strictly conditioned upon their payment or repayment of the amount of the purchase (243-244). Mr. Laing did use the privilege of using company credit for these purposes, and the amount of the accommodation purchases made by him is unknown. It cannot be argued, however, that payment of a personal premium falls within the definition of the "accommodation purchases." The latter are not the slightest evidence of actual authority in Mr. Laing to use corporate loan proceeds, or any company funds, to pay personal premiums.

B. Mr. Laing did not have apparent authority to request diversion of the funds.

Defendant argues that apparent authority exists here for the reason that Laing was indebted to the company, and therefore, must have been using company credit in the past; and further, because the defendant did pay premiums on his personal policy. The record supports neither of these contentions, but even if true this would not support a finding that Mr. Laing was apparently authorized to use company loan proceeds to pay his personal premium.

As defined by the restatement of agency, Section 27, apparent authority requires: 1) Conduct by a principal; 2) Which when reasonably interpreted; (3) Causes another to believe the principal party consents to the agent's act. What conduct has there been by the corporation, not that the doing of Laing alone, which when reasonably interpreted by defendant would have lead them to believe that Mr. Laing

could use corporate loan proceeds to pay his personal premium? ---Whether or not Mr. Laing may have been indebted to the company, such fact would be no evidence of apparent authority. First, the evidence presented at trial does not allow us to determine the extent of any such indebtedness. The company's books were not in the best order, and Exhibits Z and 11 (Page 32) are not sufficient to enable us to determine the extent of any indebtedness. They represent at most debits and credits to his account, the exact significance of which are unknown. (Page 316 and 254). Mr. Price, in addition to Mr. Hilkert, acknowledges that these entries cannot be interpreted. More important, however, the defendant did not have any knowledge of the entries on these ledger sheets, or the extent of Mr. Laing's indebtedness at the time they attempted to use the $458.55 of corporate loan proceeds on his personal policy.---Whether or not the company ever paid premiums on Mr. Laing's personal policy in the past is no evidence of his apparent authority. While the Trial Court has made no finding of fact as to whether or not the corporation had paid premiums in the past, they did expressly find:

> "That the Laing Corporation did not at any time have actual nor implied notice of use of corporate funds by Laing to pay any premium on his personal policy No. 839-63-09." (Finding of Fact No. 12)

Nor can the corporation itself or Mr. Hilkert, the other officer, be charged with any knowledge that the corporation had paid such premiums in the past. Although the books reflected disbursements of an amount similar to the amount of

Mr. Laing's personal premium, they do not identify the entries as being premium payments, and it was impossible from reviewing the books to determine whether or not they were in fact premium payments. (Page 323-324). Mr. Laing's execution of the two money-matic requests (Exhibits N and O) are at most unilateral acts by Mr. Laing, unknown to the corporation, and cannot serve as a basis of any apparent authority.

That Laing deposited the $469.00 from his personal policy in the corporation bank account is not evidence of apparent authority. Most obviously, what he did with his personal loan proceeds was not known to the defendant, and could not be relied upon then in determining the validity of their using company money to pay his personal premium. Defendant has continually argued that this is not a diversion, but was merely an exchange of corporate funds for personal funds previously given to the corporation. This is wholly unsupported by the record and factually untrue. Mr. Laing did not give the $469.00 personal loan proceeds to the company, but rather deposited them in the company account, and credited them to his own ledger account (Page 322).

Complete review of the record will reveal no conduct of LAING-GARRETT CONSTRUCTION SPECIALTIES, INC., not the conduct of Mr. Laing alone, upon which the defendant relied in determining whether or not he had the right to use the company money for his personal policy. Acts by Mr. Laing alone serve as neither the basis of apparent authority, or evidence of

his authority:

> "In the early case of Brutinel v Nygren, 17 Ariz. 491, 154 P. 1042, LRA 1918F, 713, this Court recognized the rule applicable herein,
>
> '...That an agent cannot create in himself an authority to do a particular act by its performance; and that the authority of an agent cannot be proved by his own statement he is such...'
>
> "...The nature and extent of an agent's authority...ultimately may be established only by tracing it to its source in some word or act of the alleged principal. The agent cannot confer authority upon himself, or make himself agent merely by acting as such or saying that he is one..."
>
> "The agent's authority, moreover, may not be shown merely by proving that he acted as agent. A person can no more make himself agent by his own acts only than he can by his own declarations or statements... (Mechem on Agencys, Sec. 289, (17 Ariz. at 497, 154 P. at P. #1044)."
>
> "In United States Smelting, Refining & Mining Exploration Co. v. Wallapai Mining and Development Co., 27 Ariz. 126, 130, 230 P. 1109, 1110, this Court stated:
>
> "...The rule is well established not only in this State but elsewhere that the declarations of an alleged agent are not evidence of the fact of agency nor the extent thereof. The agency must be proved by other evidence before his (the agent's) acts and statements can be shown against the principal. At best such declarations are mere heresay..." (Bank of America Nat"l Trust & Savings Asso. vs. Barnett, Supra.)

In determining the state of Mr. Laing's authority here, we are not discussing factual situations which existed in

the GlensFalls Indemnity and Reif cases argued at length in appellant's brief (Glens Falls Indemnity Co. v. Palmetto Bank, 23 F. Supp. 844 (D. C., W. D. S. C., 1938), affd. 104 F. 2d 671). The Court, in the last cited cases, made very clear that their rulings were based upon findings that the persons dealing with the agent were "dealing with him in good faith" (Page 24 of appellant's brief), that there was no evidence that the third party had "notice of any intended misappropriation" (Page 26 of appellant's brief), and that the corporation had notice, of the acts for the reason that the "indebtedness was invariably entered correctly in the corporate books." Defendant here, of course, has not dealt in good faith, was not innocent of the fact that Mr. Laing intended to misappropriate the funds of the corporation, and the corporation did not, in fact, know this nor have any way of knowing this.

Most important in establishment of apparent authority is good faith and reasonableness of the part of the party dealing with the agent. How could the defendant have reasonably believed that Mr. Laing had the right to use company money to pay his personal premium? Defendant's agent, Mr. Lillico, who handled the transaction has testified that he was well familiar with the nature of the business of the corporation, that he had known Mr. Laing for 29 years and Mr. Hilkert for 30 years; that he knew they were officers of the corporation; that he originally sold the policy in question to the corporation and also two additional policies

to Mr. Laing; that the corporate policy was issued after discussion and conference with both Mr. Hilkert and Mr. Laing; that he pursuant to normal company policy requiring verification of authority to apply for a loan, took the application to Mr. Hilkert for signature and then later confirmed Mr. Hilkert's authority in writing by obtaining a copy of the resolution from Mr. Laing and forwarded them to the company before the loan was actually approved (Page 159-166). He obviously was aware of the fact that any use of the company loan proceeds by Mr. Laing would be to the detriment of Mr. Hilkert, and to creditors of the corporation, and in fact was a fraud upon the corporation. If he followed Mr. Laing's instructions under these circumstances, he acted at his peril.

The record does not support a conclusion that LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. was the alter ego of its president, Mr. Laing, that defendant ever believed this, or believed that it could disregard the corporation as a separate entity from that of its officers. That defendant required confirmation of an officer's authority prior to accepting a loan, leaves no question about this. We respectfully request the Court disregard the defendant's argument that an alter ego situation exists here, not only because the record does not support it, but for the further reason that this is the first time any such issue has been raised herein. (Fanchon & Marco, Inc. v. Paramount Pictures, 215 F. 2d 167, Cert. denied 75 S. Ct. 293, 348 U.S. 912, 99 L. Ed. 715 (C.C.A. Calif. - 1954); (Dougall v. Spokane P. & S.

Ry. Co., 207 F. 2d. 843, Cert. denied 74 S. Ct. 429, 347 U.S. 904, 98 L. Ed. 1063 (C.C.A. -Or. - 1954); (First Nat. Bank of Dodge City, Kan. v. Perschbacher, 335 F. 2d 442 (C.C.A. N. Mex.); (Hebets v. Scott, 152 F. 2d 739 (C.C.A. Ariz. - 1946).

C. The corporation, and plaintiff as its successor, has not ratified the diversion of funds and is not estopped now to question same.

One cannot ratify an act which it could not authorize in the first instance. Specifically a corporation cannot ratify an ultra vires act (13 Am. Jur. 931-933, Corporations 979-980). Ratification can result only upon full knowledge of all material facts, and upon formal action by the corporation at a properly assembled meeting (13 Am. Jur. 930-934, Corps. 978, 982.)

Mr. Laing, by his conduct, of course, could not ratify his own act, and bestow authority upon himself.

> "The president cannot be regarded as the agent of the corporation for the purpose of ratifying his own acts any more than for conferring authority upon himself in the first instance to make a contract." (13 Am. Jur. 932, Corporations, 979).

Books and records of the corporation did not reflect the loan nor the application of the loan proceeds, nor the fact that $458.55 had not been received, nor that Mr. Laing may have used company money to pay premiums in the past. (Pages 325-326). Mr. Hilkert acted promptly upon discovery of the diversion, but unfortunately, the insured died approxi-

mately nine days afterwards and the affairs of the corporation were immediately tied up resulting eventually in the involuntary petition in bankruptcy. The corporation did no act upon which the defendant relied, or had a right to rely, and defendant did not change its position to its detriment in reliance on the conduct of the corporation. Thus, all necessary elements of estopel are lacking (19 Am. Jur. 643, Estopel No. 42). The last element of estopel warrants further discussion. In this case, how did defendant change its position to its detriment? The only thing they did was to secure another premium payment on policy 839-63-09, which of course, operated only to its benefit. It only improved its position.

For the sake of argument, however, even were it true that the corporation would be estopped and denied authority to use its money for payment of Mr. Laing's premium, such estopel would not be applicable to the plaintiff who represents creditors of the insolvent corporation. The corporation exists not only for its stockholders, but also its assets constitute a trust for the benefit of its creditors. A stockholder or officer even with the approval of the Board of Directors cannot divert corporate assets for personal purposes to the prejudice of its creditors. (Ward v. City Trust 84, NE. 585). Accordingly, plaintiff as Trustee in Bankruptcy of the estate of the insolvent corporation, is not bound by any such diversion, nor estopped to claim it was improper. The Court in Jennings v. Studebaker Sales

Corp., 170 A. 626-N.J. 1934) had before it a case strikingly similar to ours. A receiver of an insolvent corporation sought recovery of $27,000 paid its president, Mr. Jones, by a series of corporation checks, on a personal debt; the Court found that the Jones Corporation never authorized the use of its funds to pay Mr. Jones' debt, nor authorized him to sign any agreement as president of the corporation binding the corporation to repay his personal loan. At Page 627, and the Court stated:

> "The money owed by Mr. Jones to the defendant was of no concern whatever to the Jones Corporation, and outside the authority conferred by law or by the by-laws, upon Jones, as president, he had no power to bind the corporation any more than any other director."
>
> "The relation a director bears to a corporation is essentially fiduciary, and it does not require a code of regulation to inform such fiduciary officer what he may or may not do. Common honesty is the unfailing index to what is permissible and what is forbidden."

And at Page 628:

> "As a matter of law, the defendant in receiving from Mr. Jones, the president of the Jones Corporation, the funds of the company in payment of a personal debt of its president, receives it at its peril. Prima facie the act is unlawful unless authorized or ratified by the corporation. (Citations given)
>
> "It is further urged that at the time these payments were made the corporation was solvent. Assuming that the corporation was solvent, no authority can be cited in support of the proposition that its president may misappropriate its funds, diverting them for the pay-

> ment of personal obligations without authority, precedent or subsequent. Estoppel cannot be invoked against the receiver of a corporation presently insolvent who represents both creditors, stockholders and all parties in interest in a transaction unconscionable in essence and known to be such by the party sought to be charged even though the transaction had consummated while the corporation was solvent in the absence of the consent of all parties concerned. The appellant was not an innocent holder. On the stated days it received in payment of Jones personal obligation checks of the corporation. The receipt of these drafts on corporation funds was an eloquent warning that reasonable people could not misunderstand."

As found by the trial court, Mr. Laing did not have authority to request or instruct use of the corporate money to pay his personal premium, defendant did not have the right nor authority to use said corporate loan proceeds to pay a premium on a policy owned by Mr. Laing or anyone else, and these findings of fact being supported by the record are conclusive.

POINT TWO

DEFENDANT WAS INDEBTED TO THE POLICY OWNER, LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. ON JANUARY 27, 1961, IN THE SUM MORE THAN SUFFICIENT TO PAY THE PREMIUM THEN FALLING DUE, AND IS CONCLUSIVELY PRESUMED TO HAVE DONE SO TO AVOID A LAPSE.

The debt arose at the time of a distribution of the loan proceeds, by failure of defendant to pay to the policy owner $458.55 of the loan proceeds. It is only a matter of semanti as to whether we say defendant did not pay over this sum of the corporation, or whether they have fraudulently and wrongfully misappropriated this money and thus are liable to the policy owner for the amount of damages sustained. In either event, defendant held $458.55 for the use and benefit of LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. at the time the premium fell due on January 27, 1961. (Finding No. 9). The parties, to-wit: the policy owner LAING-GARRETT CONSTRUCTION SPECIALTIES, INC., and MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, had not contracted in regard to disposition and application of these funds. (The parties, of course, had contracted as to the use of the "loan value" of the policy. The $458.55 then on hand no longer was "loan value" already havin been removed therefrom by virtue of the loan transaction of August, 1960. This is further born out by the fact that defendant at all times herein has continued to claim interest due on the said sum by virtue of the loan and in calculating the "paid up value" of the policy claim a set off in that

amount. It is not now, nor never has been plaintiff's position that defendant was required to use any portion of the "loan value" of the policy to pay a premium. This the contract does prohibit under the circumstances here. Once having made a loan, however, setting it up on their books as the sum due from the policy owner, and in fact charging interest thereon, these are funds which absolutely belong to the policy owner upon approval of the loan.) Thus, being indebted to the corporation on January 27, 1961, in the sum of $458.55, defendant is conclusively presumed to have used $364.80 thereof to pay the premium which then fell due.

Equitable Life Assurance Society of U.S. v. Pettid
11 P. 2d. 833 40 Ariz. 239 - 1932

U.S. v. Morell, 204 F. 2d. 490 (C.C.A. N.D. - 1953)

Union Central Life Insurance Company v. Caldwell,
58, S.W. 355 (Ark. 1900)

Birlew v. Mutual Benefit H. and A. Association,
24 P. 2d 677 (Idaho - 1933)

McNaughton v. DeMonies Life Insurance Company,
122 NW. 764 (Wis. 1909)

Fogg v. Morris Plan Insurance Company, 188 New
York Sup 867 (1921)

Reliance Life Insurance Company v. Hardy, 222
SW 12 (Ark. 1920)

Ruderman v. Mass Accident Company, 180 A, 237
N.J. (1935)

Leech v. Federal Life Insurance Company,
15 NE 2d 1006 (C.C.A. Ill. - 1938)

Commonwealth Life Insurance Company v. Gault's
Administrator, 76, SW 2d 618 (Ky. 1934)

Cheek v. Commonwealth, 126, SW 2d 1084
(Ky. 1939)

This is not a limited principle, but one absolute in the law of insurance, once it has been found that there is money on hand, regardless of its source, and that the parties have not contracted to the contrary, both of which situations exists here.

## POINT THREE

## PLAINTIFF IS ENTITLED TO INTEREST ON THE AMOUNT DUE PURSUANT TO THE POLICY FROM AND AFTER THE DATE OF PROOF OF DEATH OF THE INSURED.

The policy (Exhibit A) provides:

> "The Mutual Life Insurance Company of New York will pay the face amount to the beneficiary upon receipt of due proof of the insured's death whether death occurs before or after the paid up date subject to the provisions on this and the following pages of this policy..."

Defendant was satisfied as to the fact of death of the insured as of the 4th day of October, 1961, and waived formal proof of death by its letter of that date (Exhibit L). Accordingly, the proceeds of the policy were payable at the latest by October 4, 1961.

It is absolutely settled law in the State of Arizona that a creditor is entitled to interest on money withheld after due, as damages for the loss of its use (Southwest Mines and Development Company v. Martignene, 64 P. 2d. 1031, 49 Ariz. 88).

Interest is payable as a matter of law on sums due from and after the due date thereof or demand for payment, and the right to interest is not dependent upon contractual provisions of the parties. (Arizona Life Insurance Company v. Lindell, 140 P. 60, 15 Ariz. 471 - 1914; Cochise Hotels v. Douglas Hotel Operating Company, 316 P. 2d. 290, 83, Ariz. 40, (1957)). See also Palmcroft Development Company v.

City of Phoenix, 51 P. 2d. 921, 46 Ariz. 400 (1935); Atlantic Commission v. Noe, 53 P. 1088, 47 Ariz. 123 (1936).

A.R.S. 44-1201 provides for 6% interest upon any "legal indebtedness unless contracted to the contrary."

The general rule is also stated in 47 C.J.S. 55, Interest No. 45, even though the contract itself provides that the debt is not to bear interest. At Page 57, and Interest No. 46, it is stated that in the absence of a special contract as to interest, or the time a debt is due, the interest is allowable from the time of demand. (See also 46 C.J.S. 1080, Insurance No. 1690)

Having found that defendant is liable to plaintiff in the sum of $76,832.05, that defendant was satisfied as to the proof of the insured's death as of October 4 1961, and has waived formal proof thereof, the Trial Court should have allowed interest on the sum due from October 4, 1961, at the rate of 6% per annum until paid. Plaintiff at all times since the inception of this suit has requested interest, as is reflected by plaintiff's complaint, trial memorandums and proposed findings of fact and conclusions of law.

## CONCLUSION.

LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. was a small closely held company; this does not mean, however that it was not a legitimate corporation. As is common in many such companies, one businessman was primarily the financial backer and the other handled the management. Mr. Hilkert not being

familiar with the construction or building industry, relied heavily upon Mr. Laing--and unfortunately his integrity--in the day to day operation of the business affairs. If any special problems arose which involved company policy, Mr. Hilkert would participate. He, at all times, proceeded in good faith and assumed that Mr. Laing was doing the same. Upon the latter's death, however, it became apparent that such was not the case, to the regret of the company creditors, including Mr. Hilkert. From the books and records of the company, it is impossible to determine what did happen. It is clear, however, that Mr. Hilkert, at no time prior to Mr. Laing's death, knew or could reasonably have been expected to know, whether or not Mr. Laing was using company money to pay personal premiums, or that he had been using company money for any other personal purposes other than nominal accommodation purchases.

It is not material here to evaluate Mr. Laing's conduct, but only to determine whether or not the defendant MUTUAL LIFE INSURANCE COMPANY OF NEW YORK has properly refused to remit the $458.55 balance of the company loan to the company, or whether the defendant, through its carelessness or actual fraud, has made itself a party to the wrong attempted to be perpetrated by Mr. Laing. By the policy-contract defendant has agreed that LAING-GARRETT CONSTRUCTION SPECIALTIES, INC. was the "right owner" in the policy and that it alone had the privilege of exercising the various options provided. We only ask that they be held to the

terms of this contract which they have made.

Defendant is in no position to plead innocence, nor that they have been prejudiced in any way. They relied upon Mr. Laing's representations at their peril, in a situation where anyone with any common sense would have backed off. By the manner in which they processed the loan application, requiring confirmation of authority by both officers of the corporation, they leave no doubt but that they were aware of problems that can arise in dealing with an agent of the corporation, including LAING-GARRETT CONSTRUCTION SPECIALTIES, INC Then when it came time to disburse the loan, they "threw caution to the wind" and try to tell us that they followed an oral instruction from Mr. Laing to use the money on his personal policy. This no reasonable person can be expected to believe. Mr. Lillico, in complying with his buddy Laing's request, not only allowed a fraud to be committed, but in effect made defendant a party to it.

The only fair conclusion is that defendant has very casually, carelessly, negligently, if not fraudulently handle this account. Their errors have only compounded themselves. Particularly, their letter of April 11th in response to an inquiry to Mr. Hilkert (Page 132-133 and 216) upon which they say Mr. Hilkert should have been alerted to the situation is wholly erroneous and misleading, and caused only further confusion instead of helping the situation.

If Mr. Laing had paid his personal premiums with company money in the past, the first time it happened it was wrong,

the second time it happened it was wrong, and every time thereafter, and defendant knew each and every time that it was wrong and repetition did not make it right.

We are not here to evaluate the conduct of either Mr. Laing or Mr. Hilkert; what they did or intended is immaterial; plaintiff's rights are not derivative from them. In fact, had they both concurred in a gift of company assets to the defendant or any other person, the act would have been in fraud of creditors and still invalid.

The ruling of the trial Court is supported by the evidence, and reflects that defendant has not overcome the presumption that the policy remains in full force and effect to the date of death of the insured, nor sustained its burden of proving a lapse. There is no reason to declare the policy forfeited; it was in full force and effect at the date of Mr. Laing's death. Judgment in favor of plaintiff and against defendant in the sum of $76,832.05, plus interest at the rate of 6% per annum until paid, from October 4, 1961, is proper.

WILSON & McCONNELL

Attorneys for Plaintiff-Appellee-Cross-Appellant

CERTIFICATE OF ATTORNEY.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Beverly J. McConnell

Attorney for Plaintiff-Appellee.

# APPENDIX

EXHIBITS.

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